No. 93-986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOSEPH MCINTYRE,
Executor,
Petitioner,
v.
OHIO ELECTIONS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Ohio Rev. Code § 3599.09(A), which requires that election materials distributed to the public identify the source of the material, violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Among the States' important interests is "the power to regulate their own elections." *Burdick v. Takushi*, 112 S. Ct. 2059,

2063 (1992). Such regulation is essential to conducting fair elections which are free of fraud and in which an informed electorate can participate.

Ohio's requirement that election materials distributed to the public identify the source of the material serves the compelling state purposes of fostering an informed electorate and preventing election fraud, and is narrowly tailored to serve those purposes within the election context. Similar laws have long existed in many States. *See* Br. *Am. Cur.* State of Tennessee, *et al.* 1 & App. A-1-A-2 (indicating that disclosure statutes similar to Ohio's are in force in almost every State); *Talley v. California*, 362 U.S. 60, 70 n.2 (1960) (Clark, J., dissenting) ("[t]hirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections").

Moreover, source identification requirements are part of a larger body of election reporting and disclosure requirements important to all States. *See, e.g.*, Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 127-29 (4th ed. 1992) (Table 7-1) (indicating that all fifty States have campaign disclosure requirements); *see generally*, Federal Election Commission, *Campaign Finance Law 92* (1992) (discussing statutory requirements in each State). Thus, the invalidation of Ohio's source identification requirement could not only jeopardize source identification laws in many other States, but could also call into question other election disclosure laws which limit anonymity in campaign contributions, expenditures, and communications.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt respondent's statement of the case and provide only the following discussion of points relevant to *amici*'s argument.

1. On two separate occasions during the week preceding a primary election, Margaret McIntyre[2] distributed flyers opposing a school tax levy which had been placed on the ballot in Westerville, Ohio. Pet. App. A-1. She distributed these flyers to attendees at meetings held at two public schools in Westerville to discuss the proposed levy. McIntyre's flyers expressly advocated a specific election result: a "No" vote on Issue 19, the School Tax Levy. *See* Pet. App. A-38 - A-39. Although some of these flyers contained McIntyre's name and address, Pet. App. A-31, others did not, and thus failed to comply with Ohio Rev. Code 3599.09(A), which requires such source identification. *See* Pet. App. A-1. These flyers indicated only that they were authored by "Concerned Parents and Tax Payers." *See* Pet. App. A-38 - A-39.

According to McIntyre, these nonconforming flyers were mistakenly distributed along with otherwise identical flyers which did contain her name and address in compliance with Ohio law. *See* J.A. 12, 36-40. McIntyre explained in correspondence to the Ohio Elections Commission (OEC) and in testimony before the OEC that she intended all of the flyers to have contained her name and address, in conformance with Ohio law. *See* J.A. 39 ("[T]he ones I passed out, to the best of my knowledge, all of them had my name on them, all of them. I wouldn't have passed it out without my name on it."); J.A. 12 ("At no time was there any intent to hide my identity . . . ."). McIntyre indicated that the nonconforming flyers were distributed as the result of an administrative error in copying, printing, or compiling the flyers for dis-

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[2] Although Joseph McIntyre, Executor, has been substituted as the named petitioner in this case, *amici* refer to the original petitioner, Margaret McIntyre, in this brief.

tribution. *See* J.A. 12, 36-40. A copy of the conforming version of the flyer, which included McIntyre's name and address, was attached to McIntyre's correspondence to the OEC. *See* J.A. 12, 36-37.

2. After a hearing, the OEC found that some of the materials distributed by McIntyre were not in compliance with § 3599.09(A). It accordingly fined her $100 for violating the Ohio law. Pet. App. A-40. McIntyre never alleged that she suffered any other adverse consequences as a result of her leafletting.

SUMMARY OF ARGUMENT

1. While Ohio's requirement that the source of campaign materials be identified implicates important First Amendment interests, *see Talley v. California*, 362 U.S. 60 (1960), that observation marks only the starting point of constitutional analysis. This Court's precedents establish that competing public interests served by restrictions on anonymity can be "sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam) (quoting *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). Accordingly, the Court has upheld election laws which limit anonymous speech and association. *See, e.g., Buckley*, 424 U.S. at 60-84.

2. Ohio's source identification requirement serves two vital public interests: fostering an informed electorate, and preventing fraud in the election process. Both of these interests have been recognized as legitimate and compelling. *See, e.g., Buckley*, 424 U.S. at 66-67; *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983); *Burson v. Freeman*, 112 S.Ct. 1846, 1851, 1852 (1992) (plurality opinion). Bringing the source of communications to light is particularly important in the context of ballot measures, where vast spending imbalances carry a

significant potential for confusing and misleading voters. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 307-09 (1981) (White, J., dissenting).

These compelling interests outweigh any burden the Ohio statute may place on the First Amendment interests of speakers. This is clearly the case here, where McIntyre's own statements concerning her intention to comply with the identification statute make implausible any contention that she feared reprisals or was chilled in the exercise of her First Amendment rights.

3. Ohio's statute is narrowly tailored to serve vital public interests. It applies only within the limited context of elections, and goes no further than is necessary to provide essential information to voters and prevent campaign fraud. Neither the absence of a minimum expenditure threshold for the identification requirement, nor the limited regulatory exemptions for buttons, pencils, and like items, reflects an unconstitutional lack of tailoring. Both of these features of the Ohio statute reflect line-drawing based on practical realities, an endeavor best left to the legislature. *See, e.g., Buckley*, 424 U.S. at 83.

4. Disclosure and reporting laws which place limits on anonymous political activity have long been central to the protection of the integrity of state and federal elections. They represent minimally intrusive means of safeguarding the democratic process. *See Buckley*, 424 U.S. at 82. Striking down Ohio's source identification statute could call into question other election statutes, both state and federal, which limit anonymous political activity.

ARGUMENT

I. OHIO'S ELECTION STATUTE, WHICH REQUIRES IDENTIFICATION OF THE SOURCE OF CAMPAIGN MATERIALS DISTRIBUTED TO THE GENERAL PUBLIC, DOES NOT VIOLATE THE FIRST AMENDMENT

A. Neither *Talley* Nor Any Other Decision of This Court Supports the Invalidation of Ohio's Source Identification Requirement

Ohio's requirement that election materials distributed to the public contain the source's name and address unquestionably touches upon significant First Amendment interests. *See Talley v. California*, 362 U.S. 60, 64 (1960) (noting historical significance of anonymous speech); *see also Buckley v. Valeo*, 424 U.S. 1 (1976). But petitioner's interest in anonymous political speech is not the only interest that must be considered in this case.

Neither *Talley* nor any other decision of the Court suggests that the First Amendment guarantees speakers anonymity in all circumstances, particularly where weighty interests of other members of the public are at stake. Specifically, the Court has held that disclosure requirements which place limits on anonymity within the context of fundamental democratic processes such as elections, and which thereby safeguard vital interests of the electorate as a whole, can be fully consistent with the First Amendment. *See, e.g., Buckley*, 424 U.S. at 66-72, 80-82 (upholding disclosure requirements for campaign contributions and independent expenditures); *United States v. Harriss*, 347 U.S. 612, 625-26 (1954) (upholding reporting requirements imposed on lobbyists).

As the Court explained in a related context, recognition that important First Amendment liberties are implicated is only the first step in constitutional analysis:

> To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the

> impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 91 (1961). The constitutional validity of a regulation such as Ohio's is tested not merely by asking whether it touches upon the speaker's First Amendment interests, but by evaluating whether the burden that it places on those interests is outweighed by the legitimate public interests that it serves.

In *Talley*, a blanket ban on "all handbills under any circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires" was held to be too untailored and broad to serve any purported state interest, such as the prevention of fraud. 362 U.S. at 64. This sweeping ban was struck down not because anonymous literature is entitled to absolute protection under the First Amendment, but because there was no countervailing public interest to be weighed against the burden which the ban placed on First Amendment interests. Indeed, the *Talley* Court expressly declined to "pass on the validity of an ordinance limited to prevent [fraud] or any other supposed evils." *Id.*

Where such vital public interests are at stake, the Court has consistently upheld the constitutional validity of restrictions on anonymity. In *Buckley*, the Court expressly recognized that although election disclosure requirements may carry with them the potential for interference with First Amendment interests, "there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." 424 U.S. at 66 (quoting *Communist Party*, 367 U.S. at 97). The Court went on to distinguish the broad ordinance at issue in *Talley* from the disclosure requirement

for independent campaign expenditures, on the ground that the latter "is narrowly limited to those situations where the information sought has a substantial connection to the governmental interests sought to be advanced." *Id.* at 81. The *Buckley* Court found that the burden imposed by the disclosure requirement was "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82. In so finding, the Court noted that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. *See also Burroughs v. United States*, 290 U.S. 534 (1934) (upholding disclosure requirements for political contributions and expenditures).

Similarly, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court assumed the validity of an identity disclosure requirement for those contributing to committees formed to support or oppose ballot measures. There, in striking down a limit on contributions, the Court expressly relied on the efficacy of disclosure requirements as a less intrusive means of fulfilling the City's objectives. *See id.* at 298. *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (noting necessity of disclosure requirements in the context of corporate political advertising).[3] *Cf.*

[3] Contrary to petitioner's assertion, Pet. Br. 32-33, the Court's language in *Bellotti* in no way limits the validity of source identification requirements to the corporate context. Indeed, in making this point, the *Bellotti* Court relied upon *Buckley*, a case which involved disclosure requirements that were not limited to corporations. *See* 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 66-67).

Moreover, it is difficult to see how a source requirement would be enforceable or would have the "prophylactic effect" the Court refers to, *see Bellotti*, 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 67), if only certain categories of speakers were required to identify themselves on campaign literature; there would be no way to determine whether a given piece of literature lacking identification was in violation of such a statute without independently determining the source of the literature.

United States v. Harriss, 347 U.S. 612, 625-26 (1954) (upholding a reporting requirement imposed on lobbyists), *cited in Bellotti*, 435 U.S. at 792 n.32.

Here, the Ohio legislature has determined that requiring the identification of the source of campaign literature is necessary to safeguard the integrity of a fundamental democratic process—state elections. Given the important public interests served by the regulation, the fact that it also implicates First Amendment interests does not automatically render it invalid. On the contrary, an analysis of the compelling public interests served by Ohio's narrowly tailored identification requirement reveals that any burden placed on First Amendment interests is outweighed by the vital public interests served by the requirement. Neither *Talley* nor any other decision of this Court supports the invalidation of a state election law in such circumstances.

B. Ohio's Source Identification Requirement Satisfies This Court's Tests for Constitutional Validity

Amici agree with respondent that the Ohio Supreme Court properly applied a less stringent standard of constitutional analysis to the election regulation at issue here. *See* Resp. Br. 7-15; Pet. App. A-6 - A-8 (quoting *Burdick v. Takushi*, 112 S. Ct. 2059, 2063-64 (1992)). Yet even if petitioner were correct in contending that strict scrutiny must be applied to Ohio's source identification requirement, *see* Pet. Br. 19-22, the decision of the court below should be affirmed. This is because the statute is justified by compelling state interests that outweigh any burdens it imposes on petitioner's First Amendment interests, and is narrowly tailored to achieve those state interests.

1. *Ohio's Identification Requirement Is Justified by Compelling State Interests Which Outweigh Any Burden Placed on First Amendment Interests*

Ohio's source identification requirement serves two vital state interests which the Court has expressly recognized as compelling: informing the electorate, and preventing election fraud. These compelling interests far outweigh any burden that the identification requirement places on First Amendment interests.

a. *Ohio Has a Compelling Interest in Fostering an Informed Electorate*

Ohio's law serves the important function of informing the electorate as to the identity of persons and interests supporting and opposing specific election results. As the Court emphasized in *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983), "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." And, as was recently reiterated in *Burson v. Freeman*, "this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence." 112 S. Ct. 1846, 1851 (1992) (plurality opinion); *see Eu v. San Francisco City Democratic Central Committee*, 489 U.S. 214, 228 (1989) (collecting cases).

Communications advocating a particular election outcome which are unaccompanied by proper identification carry a high potential for confusing and deceiving voters. High visibility achieved by moneyed interests through large expenditures for communications often bears no relationship to the level of public support for a candidate or ballot measure.[4] By bringing the identity of the speak-

[4] *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 624-25 (1982); Randy M. Mastro *et al.*, *Taking the Initiative: Corporate Control of the Referendum Process Through*

ers to light, source identification requirements combat the false illusion of public support that high visibility can create. Justice White has explained this crucial function of source identification requirements in referenda:

> [B]ecause political communications must state the source of funds, voters will be able to identify the source of such messages and recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals. As the existence of disclosure laws in many states suggests, information concerning who supports or opposes a ballot measure significantly affects voter evaluation of the proposal.

Citizens Against Rent Control, 454 U.S. at 308-09 (White, J., dissenting) (footnotes omitted). *See also* Thomas P. Dvorak, Comment, *State Campaign Finance Law: An Overview and a Call for Reform*, 55 Mo. L. Rev. 937, 950 (1990) ("Disclosure laws do not attempt to limit the level of influence which money plays in modern politics, but to reveal it."); Mastro, *Taking the Initiative*, 32 Fed. Comm. L.J. at 353-54 (discussing function of disclosure laws).

Requirements for the disclosure of information regarding campaign contributions and expenditures have been upheld by this Court, in part because of the vital informational function that they serve. In *Buckley v. Valeo*, the Court discussed this rationale in the context of contributions to federal candidate campaigns:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate," in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in

Media Spending and What To Do About It, 32 Fed. Comm. L.J. 316, 317 (1980).

> the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.

424 U.S. at 66-67 (footnote omitted). *See id.* at 81 (same "informational interest" served by disclosure requirements for independent expenditures).

The disclosure requirements at issue in *Buckley* pertained to federal elections, which involve only candidate votes, not "ballot measures" or referenda.[5] However, the same compelling informational interests are served by disclosure requirements applied to state ballot issues.[6] In *Bellotti,* a case involving referenda, the Court noted that "[i]dentification of the source of [political] advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. And in *Citizens Against Rent Control,* the Court expressly acknowledged the potential for voter confusion in the context of ballot measures, noting that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." 454 U.S. at 298. In finding that this potential for confusion did not justify Berkeley's limit on

[5] Because federal elections are not used to decide issues, the Court was able to draw a distinction between "issue discussion" and "advocacy of a political result" in interpreting the scope of federal election laws. *See Buckley,* 424 U.S. at 79. In state elections, however, "advocacy of a political result" encompasses not only candidate campaigning, but also campaigning on ballot issues.

[6] Ballot measures are fundamental to the democratic processes of virtually every State. *See* Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,* 29 U.C.L.A. L. Rev. 505, 508 (1982) ("Every state but Delaware employs the ballot proposition for amending the state constitution, and most states use it for approving certain additional measures, such as bond issues."). Lowenstein describes the initiative and referendum as "[t]he most conspicuous forms of direct democracy." *Id.*

contributions, the Court relied on Berkeley's disclosure requirement to inform voters as to the identity of contributors:

> Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting.

Id.[7]

Indeed, it appears that the informational function served by disclosure requirements may take on heightened significance in the context of ballot issues because of the threat of voter confusion and distorted outcomes from unbalanced spending. *See* Wright, *Money and the Pollution of Politics,* 82 Colum. L. Rev. at 622 ("The unholy alliance of big spending, special interests, and election victory is found, perhaps in its most dramatic form, in referendum contests."); *id.* at 623 ("A number of studies show that, in state after state, in election after election, massive spending and sophisticated media campaigns by special interest groups have swamped referenda that were initially favored by a majority of the voters.").[8]

Moreover, voters often require more information in the ballot measure context than they do in the context of

[7] Similarly, the Court in *Harriss* upheld reporting requirements for lobbyists on the ground that they would enable legislators to appropriately evaluate the pressures to which they were being subjected and would thereby prevent "the voice of the people" from being "drowned out by the voice of special interests seeking favored treatment while masquerading as proponents of the public weal." 347 U.S. at 625.

[8] *See also* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech,* 130 U. Penn. L. Rev. 646, 647 n.8 (1982) (discussing imbalances in spending in connection with state ballot measures). *See generally* Lowenstein, *Campaign Spending and Ballot Propositions,* 29 U.C.L.A. L. Rev. 505; *Citizens Against Rent Control,* 454 U.S. at 308 n.4 (White, J., dissenting).

candidate elections. The California Supreme Court explained this heightened need for information in *Brown v. Superior Court:*

> A ballot measure is devoid of personality and voters who seek to judge the merits of issues by reliance on the personality of those supporting different points of view can do so only if they are made aware, prior to [the] election, of those who are the real advocates for or against the measure.

487 P.2d 1224, 1232 (Cal. 1971), *quoted in Citizens Against Rent Control,* 454 U.S. at 309 n.7 (White, J., dissenting); *see* Mastro, *Taking the Initiative,* 32 Fed. Comm. L.J. at 317.[9]

In short, it is clear that the information provided by disclosure requirements such as Ohio's serves the compelling public interest of fostering an informed electorate.

b. *Ohio Has a Compelling Interest in Preventing Election Fraud*

"The Court also has recognized that a State 'indisputably has a compelling interest in preserving the integrity of its election process.'" *Burson,* 112 S. Ct. at 1852 (plurality opinion) (quoting *Eu,* 489 U.S. at 231). Accordingly, the Court "has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.* Ohio's requirement that the source of cam-

[9] *See also* Lowenstein, *Campaign Spending and Ballot Propositions,* 29 U.C.L.A. L. Rev. at 604 ("Several states have attempted to increase the amount and accessibility of information regarding ballot measures. Perhaps the most important device is the imposition of campaign disclosure requirements, already required [in] many states.") (footnotes omitted); *Brown,* 487 P.2d at 1233 ("A voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption, and he may gain such knowledge only through pre-election disclosure requirements of the nature here involved.").

paign materials be identified thereon clearly furthers this compelling purpose in several ways.

First, by providing information to the public as to the source of communications, the potential for deceptive presentation of a message so as to make it appear to speak for a larger or different constituency than it actually represents is minimized.[10] Second, the disclosure requirement deters false statements by adding an element of accountability to the public distribution of campaign communications, thereby discouraging malicious falsehoods and deliberate misinformation. This function is even more important in the context of ballot issues than in candidate elections, since unlike candidates who can be expected to zealously counter any falsehoods disseminated about themselves, a ballot issue may lack a zealous advocate or opponent to monitor and correct false statements. A third and related function of the identification requirement is that it facilitates the enforcement of Ohio's other election laws prohibiting various forms of campaign fraud, by providing the name of the person responsible for each communication.

Petitioner does not dispute that the prevention of campaign fraud and abuse is a compelling state interest, *see* Pet. Br. 31, but contends that Ohio's statute is not narrowly enough drawn to achieve that end since source disclosure is required "whether or not the literature contains any false or fraudulent statements." *Id.* at 30. Yet a statute requiring disclosure of the source of a campaign communication only in those instances in which the communication contained false or fraudulent statements would plainly be unenforceable. *Cf. Buckley,* 424 U.S. at 83-84 ("[T]he enforcement goal [of disclosure requirements] can never be well served if the threshold is so high that disclosure becomes equivalent to admitting violation of the contribution limitations."). Such an evis-

[10] The fact that McIntyre represented on some of her flyers that they were authored by "Concerned Parents and Tax Payers" could have misled voters in precisely this manner. *See* Opp. 2-3.

cerated statute would certainly not have "the prophylactic effect of requiring that the source of communication be disclosed." *Bellotti*, 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 67).

Petitioner also argues that the source identification requirement is unnecessary to achieve Ohio's fraud-prevention objectives because Ohio has other laws specifically directed at punishing false statements in the election context. Pet. Br. 37. But the existence of specific laws targeted at the most extreme forms of harmful conduct has never been held to preclude broader, complementary legislation that both deters that conduct and encompasses more subtle forms of harm as well.

For example, the respondent in *Burson* suggested that there was no need to protect voters from intimidation by banning campaigning within a certain radius of the polling place, since other laws already prohibited intimidation and interference with the voting process. 112 S. Ct. at 1855 (plurality opinion). The plurality found, however, that "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.* (quoting *Buckley*, 424 U.S. at 28). In *Buckley* the Court held that the need for limits on campaign contributions as an anti-corruption measure was not precluded by the existence of a bribery statute which targeted campaign corruption in its "most blatant" form. 424 U.S. at 28. In similar fashion, the compelling interests served by Ohio's identification requirement go beyond the specific falsehoods covered in other statutory provisions to include more subtle forms of deception and distortion.

Moreover, in *Buckley* the Court noted that one of the major purposes of the federal campaign disclosure requirements was to assist in the enforcement of other campaign laws, such as contribution limits. 424 U.S. at 67-68. Likewise, the enforcement of Ohio's statutory prohibitions of false and fraudulent campaign statements is greatly facilitated by the requirement that the source of each communication be identified. The specific false statement provisions and the broader prophylactic source disclosure requirement work together to advance Ohio's compelling interest in fraud prevention in a more comprehensive and efficient manner than either could accomplish alone.

c. *The Compelling Interests Served by Ohio's Identification Requirement Outweigh Any Burden on First Amendment Interests*

In assessing the validity of a disclosure measure that advances compelling state interests, the Court "look[s] to the extent of the burden that [it] place[s] on individual rights." *Buckley*, 424 U.S. at 68. Petitioner asserts that Ohio's disclosure statute burdens First Amendment interests in two respects: first, it "chills" speech, since some people will be reluctant to engage in speech if they know that they must identify themselves; and second, it is "content based" and amounts to compelled speech insofar as it requires the identification to appear along with the message. Pet. Br. 21. Neither contention provides an adequate basis for striking down the Ohio statute, given the compelling state interests which it serves.

While it is possible that, as petitioner contends, some persons might refrain from producing campaign materials as a result of Ohio's identification requirement, the Court has found that risk to be an insufficient basis for the blanket invalidation of comparable legislation that serves vital public interests. In *Buckley*, the Court considered the same arguments that are being raised here regarding the possibility of a "chilling" effect on First Amendment interests:

> It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute. In some instances, disclosure may even expose contributors to harassment or retaliation.

Id. at 68. Nevertheless, after weighing the public interests served by the disclosure requirements, including the

function of providing information to the electorate and "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," *id.* at 67, the Court concluded that such disclosure requirements were generally constitutional. *Id.* at 84.[11]

The Court has recognized that in certain factual circumstances the risk associated with the disclosure of one's identity may be so great as to tip the balance in favor of nondisclosure, such as where a factual showing of a legitimate fear of public or private reprisals is coupled with a diminished state interest in the information requested. In *Buckley*, the Court acknowledged that despite the compelling interests generally served by disclosure of the source of campaign contributions, disclosure might not be warranted in the case of "a minor party with little chance of winning an election" if it appeared that "fears of reprisal [might] deter contributions to the point where the movement cannot survive." 424 U.S. at 70-71. The Court suggested that such a situation would be analogous to two earlier cases, *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), in which the required disclosure of names of rank-and-file members was held invalid as applied to groups that had demonstrated a legitimate fear of reprisals. In such instances, the *Buckley* Court explained, "the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied." 424 U.S. at 71. *See Brown v. Socialist Workers*

[11] In the context of lobbying disclosure requirements, the Court has similarly considered the possibility that reporting requirements "may as a practical matter act as a deterrent to [the lobbyist's] exercise of First Amendment rights." *Harriss*, 347 U.S. at 626. The Court went on to find, however, that "[t]he hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id.*

'74 Campaign Committee, 459 U.S. 87, 98-102 (1982) (applying *Buckley*'s minor party exception).

Given the "sensitive associational rights" that the Court was seeking to protect with the minor party exception, *see Brown*, 459 U.S. at 109 (O'Connor, J., concurring in part and dissenting in part)—rights which are plainly not implicated by source identification requirements such as Ohio's [12]—it is highly questionable whether any analog to that doctrine would apply in this context. Yet even if fear of reprisals might require, in some imaginable case, exemption from Ohio's identification requirement, it is clear from the record that no such fear of reprisals was demonstrated here.[13] McIntyre did not refuse to comply with the statutory identification requirement on the ground that she feared reprisals; on the contrary, she testified to the OEC that she had placed her name and address on some of the flyers and had intended fully to comply with the requirement by placing identifica-

[12] Ohio's law does not infringe on the ability of individuals to join groups or to participate in speech as part of a group. Where a communication is authored by a group, rather than an individual, only the name of an officer of the group need appear on the communication; the disclosure of other group members' identities is not required. *See* Ohio Rev. Code § 3599.09(A). Significantly, the groups objecting to the disclosure of the names of their rank-and-file members in *NAACP* and *Little Rock* voluntarily disclosed the names of their officers. *See NAACP*, 357 U.S. at 464; *Little Rock*, 361 U.S. at 521 n.4. This is likely because officers' involvement in a group is so substantial as to be a matter of public knowledge even in the absence of disclosure. *Cf. Brown*, 459 U.S. at 114-15 (O'Connor, J., concurring in part and dissenting in part) (identification of "persons [who] have already publicly demonstrated their support [for a party's ideology] by their campaign work" unlikely to trigger harassment).

[13] The minor party exception requires the demonstration of a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Brown*, 459 U.S. at 93 (quoting *Buckley*, 424 U.S. at 74).

tion on all flyers that were distributed. *See* pp. 3-4, *supra*. Moreover, she openly handed out the flyers herself, and never made any attempt to hide her identity. *See* Pet. Br. 5-6; J.A. 12. Such actions would be inconsistent with any legitimate fear of reprisals; instead, it is more consistent with the explanation McIntyre herself offered—that the failure to provide proper identification was the result of an oversight. *See* J.A. 12, 36-40.

Petitioner's intimation that her prosecution under Ohio's disclosure law constitutes official "retaliation," *see* Pet. Br. 14-15, 41, is groundless. Retaliation, as relevant in the context of disclosure requirements, involves negative consequences stemming from compliance with the requirement in question, where that compliance serves to publicly identify an individual with an unpopular ideology or group. Thus, an individual who is forced to comply with a disclosure statute and who thereby reveals her previously concealed identity as a member of a particular group might suffer retaliation in the form of loss of job, violence, threats, or harassment. *See, e.g., Brown*, 459 U.S. at 113 (O'Connor, J., concurring in part and dissenting in part).

Such instances of retaliation stemming from compliance with a disclosure statute stand in stark contrast to McIntyre's situation, in which an individual has already chosen to identify herself publicly with a position, independent of the disclosure statute's requirements.[14] When such an individual is the subject of an enforcement action for her failure to identify herself in the manner required by the statute, this is not "retaliation" triggered by the compelled disclosure of her identity under the statute; it is nothing

[14] *Cf. Brown*, 459 U.S. at 111-12 (O'Connor, J., concurring in part and dissenting in part) ("Once an individual has openly shown his close ties to the organization by campaigning for it, disclosure of receipt of expenditures is unlikely to increase the degree of harassment so significantly as to deter the individual from campaigning for the party.").

more than the enforcement of the disclosure statute itself.[15]

Similarly unavailing is petitioner's contention that the Ohio statute should be invalidated as a content-based restriction on speech, on the ground that it compels the identification of the source to be printed on the literature itself. *See* Pet. Br. 21. While it is certainly true that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988); *see* Pet. Br. 21, petitioner cites no case suggesting an identification requirement like Ohio's amounts to unconstitutionally compelled speech. The compelled speech held to be constitutionally impermissible in *Riley* involved the required disclosure of specific, substantive factual data—"the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months"—prior to beginning solicitation. 487 U.S. at 786. Moreover, the *Riley* Court clarified that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id.* at 799 n.11. Thus, far from standing for a broad prohibition on any requirement that identifying information be included in a communication, *Riley* suggests that a statute such as Ohio's, which calls only for minimal identifying informa-

[15] No issue of selective enforcement was raised or litigated below, and no evidence supporting such a claim, such as evidence of patterns of enforcement or nonenforcement of § 3599.09(A) against other speakers, was presented or considered below. Speculation entertained by the single dissenting Ohio Supreme Court justice (Pet. App. A-10) and joined in by petitioner (Pet. Br. 14-15) is a patently insufficient basis for this Court to find any impropriety in the enforcement of the statute.

tion necessary to serve important state purposes, would pass constitutional muster.

In sum, the Court has already considered the burdens placed on First Amendment interests by limitations on anonymity and has consistently found them to be insufficient, standing alone, to justify the invalidation of legislation that serves compelling public interests. It has therefore found disclosure requirements to be "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82. The same conclusion is warranted here.

2. *Ohio's Identification Requirement is Narrowly Tailored to Achieve Its Compelling Purposes*

Despite the fact that Ohio's disclosure requirement operates within the limited context of elections and fulfills compelling state objectives, petitioner asserts that it is not narrowly enough tailored to survive First Amendment scrutiny. Petitioner argues both that it is overbroad insofar as it fails to exempt leafletters who have not exceeded an unspecified minimum expenditure, and that it is underinclusive insofar as it makes exceptions for certain types of campaign materials. Both contentions are without merit.

Petitioner asserts that § 3599.09(A) "does not confine itself to those activities that may potentially distort the electoral process[,]" because it does not exempt "the street corner leafletter" who has not made a sufficiently high "minimum expenditure." Pet. Br. 36.[16] The Court in *Buckley* rejected a similar argument that the federal reporting and disclosure requirements applied to amounts

[16] Petitioner does not propose a particular "minimum expenditure" threshold, nor does petitioner reveal how much was spent in printing costs and other incidentals to distribute the flyers at issue here. The record does indicate that at least some of the flyers were prepared by a commercial printer. *See* J.A. 39-40.

"too low even to attract the attention of the candidate, much less have a corrupting influence." 424 U.S. at 82. While acknowledging that "[t]he $10 and $100 thresholds" set by the federal statute "are indeed low" and observing that they "m[ight] well discourage participation by some citizens in the political process," the Court deferred to Congress's judgment in choosing the thresholds:

> [W]e cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion. We cannot say, on this bare record, that the limits designated are wholly without rationality.

424 U.S. at 83.

Here, Ohio has made a legislative judgment that its compelling interests are best served by requiring the identification of the source of campaign communications without regard to the amount of the expenditure involved.[17] There has been no demonstration that this legislative choice was unreasonable, especially given the fact that, as the Court noted in *Buckley*, "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." 424 U.S. at 19. Also significant is the fact that, as the Court recognized in *Buckley*, "disclosure serves informational functions, as well as the prevention of corruption," *id.* at 83; the former interest is advanced by disclosure of the source of even inexpensive communications. And, as the Court explained in *Buckley*, a legislature "is not required to set a threshold that is tailored only to [particular] goals." *Id.*

[17] Ohio's statute is far from unique in applying identification requirements to "the street corner leafletter." Disclosure statutes enacted in most other States likewise encompass such materials as pamphlets, handbills, and circulars. *See* Br. *Am. Cur.* State of Tennessee at App. A-1 - A-2.

Furthermore, it appears a monetary threshold would be quite problematic in the context of a source identification statute such as Ohio's. This case illustrates the problem: each flyer that McIntyre handed out might be nominal in cost on its own, but if she distributed hundreds or thousands of flyers, the aggregate cost could become very substantial. In addition, the total aggregate cost might not at first be apparent if additional sets of flyers were printed on an as-needed basis, as McIntyre has indicated was the case here. *See* J.A. 37. The same problems would be presented in the case of other "high volume" campaigning techniques, such as direct mail. Excluding all materials with a low individual cost from the source disclosure requirement, regardless of how high the aggregate cost for those materials might be, would clearly fail to fulfill the State's compelling interests. On the other hand, making all materials subject to the requirement after an aggregate expenditure threshold has been reached by the speaker would be easily circumvented and virtually impossible to enforce. *Cf. Buckley*, 424 U.S. at 84 (finding low thresholds justified, in part because they would make circumvention through aggregation of smaller contributions more difficult).

Petitioner also takes issue with the fact that § 3599.09 allows for regulatory exceptions for campaign materials (such as pencils, buttons, and balloons) where compliance with the identification requirement would be impracticable. *See* Pet. Br. 37. But States may properly enact laws which only "address the problems that confront them;" moreover, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 112 S. Ct. at 1856 (plurality opinion). Petitioner offers no evidence suggesting that Ohio acted unreasonably in determining that certain types of campaign materials, for which disclosure would be impracticable, could be exempted without threatening the compelling

interests which the disclosure requirement serves.[18] Instead, the regulatory exclusions, like the decision not to include a minimum expenditure threshold, represent a legislative judgment that is fully consistent with the compelling goals that Ohio's narrowly tailored statute seeks to achieve.

II. INVALIDATION OF OHIO'S SOURCE IDENTIFICATION REQUIREMENT COULD CALL INTO QUESTION A BROAD RANGE OF STATE AND FEDERAL CAMPAIGN DISCLOSURE MEASURES WHICH ARE ESSENTIAL TO THE INTEGRITY OF THE ELECTION PROCESS

Disclosure and reporting requirements have long been essential to election regulation at both the federal and state levels.[19] They remain "the cornerstone of reform." Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 164 (4th ed. 1992). Almost all States have identification requirements that are very similar to Ohio's. *See* Br. *Am. Cur.* State of Tennessee at 1, App. A-1 - A-2. A closely analogous statute also exists at the federal level. *See* 2 U.S.C. § 441d.[20]

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[18] A similar judgment was apparently made at the federal level. *See* 11 C.F.R. 110.11(a)(2) (exempting "bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed" from the requirements of 2 U.S.C. § 441d).

[19] *See* Christopher Cherry, *State Campaign Finance Laws: The Necessity and Efficacy of Reform*, 3 J. Law & Politics 567, 594 (1987) ("Since the last decade of the nineteenth century, contribution limits and reporting requirements have emerged as the predominant campaign finance regulation tools."); *see generally United States v. International Union United Automobile Workers*, 352 U.S. 567, 570-83 (1957) (discussing history of campaign regulation).

[20] Section 441d requires those who engage in communications advocating particular candidates for election to indicate whether the communication is funded or authorized by the candidate, the candidate's authorized political committee, or its agents. If the communication is not funded by the candidate, the communication

All fifty States have some form of disclosure or reporting requirements. *See, e.g.*, Alexander, *Financing Politics* at 127-29 (Table 7-1); *see generally*, Federal Election Commission, *Campaign Finance Law 92* (1992) (discussing statutory requirements in each State). In addition to the informational and anti-fraud functions served by these statutes, in States with campaign contribution limits they also "constitute the primary method of monitoring compliance with the limits." Cherry, *State Campaign Finance*, 3 J. Law & Politics at 578. Likewise, a majority of States forbid anonymous contributions. *See* Frank J. Sorauf, *Money in American Elections* 287 (1988) ("36 [States] have absolute prohibitions against anonymous donations; three more prohibit them above a stated sum"). Such prohibitions on anonymous contributions often close a major enforcement loophole in States that have contribution limits: "[i]n states which do not regulate anonymous or misattributed donations, a donor may easily circumvent contribution limits." Cherry, *State Campaign Finance*, 3 J. Law & Politics at 575.

Because disclosure represents a minimally intrusive mechanism for combatting many of the evils that can distort, undermine, and corrode elections, it has been recognized as central to our democratic system. "If several basic truths must be considered in designing a system of political finance regulation, at least one basic policy should be universal: comprehensive and timely disclosure.

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must identify the persons who paid for the communication. 2 U.S.C. § 441d.

While Section 441d is the most directly analogous federal disclosure statute, a number of other federal disclosure and reporting provisions are directed at the same basic goals—fostering an informed electorate, preventing fraud and corruption, and facilitating the enforcement of other campaign finance laws, such as contribution limits. *E.g.*, 2 U.S.C. § 434 (prescribing reporting requirements for political committees which include, *inter alia*, the identification of persons and political committees making contributions or other transfers). *Buckley*, 424 U.S. at 66-68, 80-82.

Both liberals and conservatives have deemed disclosure fundamental to the political system." Alexander, *Financing Politics* at 164.

If the First Amendment were found to prohibit Ohio's source identification requirement, a garden-variety campaign disclosure requirement, other longstanding campaign finance regulations involving disclosure could also be called into question. *See* Cherry, *State Campaign Finance*, 3 J. Law & Politics at 583-84. The Court should be reluctant to make such inroads on this vital, well-established body of campaign disclosure law.

CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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